IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | CASE. NO. 1:18-CR-11-RWG-SMD |
| | ) | |
| BRYANT POUNCY, | ) | |

**ORDER**

Now before the court is Defendant Bryant Pouncy's Motion to Suppress Wiretaps. Doc. 367. The authorization for the at-issue wiretap application filed with United States District Judge W. Harold Albritton, III on February 28, 2017. Doc. 374-1 at 2. Judge Albritton granted the authorization on the same day it was received, permitting interceptions for a 30-day period. *Id*. at 98. Pursuant to the authorization, Defendant Pouncy's telephone was intercepted from March 2, 2017 through March 30, 2017. Defendant now moves to suppress all wiretap evidence seized pursuant to this authorization, arguing that the primary wiretap application was insufficient on its face pursuant to 18 U.S.C. § 2518(10)(a)(ii). Doc. 367 ¶ 1. The Government filed its response to Defendant Pouncy's motion to suppress on February 5, 2019. Doc. 374.

First, the Defendant asserts that the February 28, 2017 wiretap authorization order is "insufficient on its face" because the underlying application referenced an outdated Attorney General delegation order. The Defendant is not wrong that the wiretap application erroneously cited to "Order Number 3055-2009 of February 26, 2009," instead of the controlling delegation, Order Number 3536-2015. Doc. 374-1 at 4 ¶ 5. However, a typographical error of this sort does not carry with it the kind of substantive defect sufficient to warrant suppression. Nor did the error unfairly prejudice the Defendant: as the Government points out, the application was accompanied by a Department of Justice memorandum that *did* reference the correct order. Doc. 374-1 at 15.

Section 2518 governs the procedures authorizing wiretap interceptions. The statute requires that orders authorizing or approving wire interceptions specify: (1) the target subjects; (2) the target facilities; (3) a description of the communication sought to be intercepted as it relates to the offense; (4) the identity of the agency authorized to intercept the communication and the person authorizing the application; and (5) the period of time for the interception. 18 U.S.C. § 2518(4)(a)–(e). On the other hand, applications for an order authorizing the interception must include: (1) the identity of the officer making and authorizing the application; (2) a detailed statement of the facts and circumstances justifying the interception, as well as a description of the underlying offense, the target facilities, the communications sought to be intercepted, and the target subjects; (3) a statement as to whether other investigative procedures have been tried and failed; (4) the time period for the interception; and (5) a description of all previous applications submitted for the same target subjects. 18 U.S.C. § 2518(1)(a)–(f). The statute contains its own exclusionary rule, permitting suppression of the communications on the grounds that they were unlawfully intercepted, the order of authorization is facially insufficient, or the interception was not made in conformity with the authorization order.[1] 18 U.S.C. § 2518(a)(i)–(iii).

The Eleventh Circuit has acknowledged that a technical violation of § 2518 does not require suppression of the evidence obtained pursuant to the wiretap "so long as 'the procedures actually employed fulfilled the purpose of [the statute] and the technical noncompliance did not prejudice the defendants.'" *United States v. Carson*, 520 F. App'x 874, 891 (11th Cir. 2013) (citing *United States v. Caggiano*, 667 F.2d 1176, 1178 (5th Cir. Unit B 1982)). Therefore, technical

[1] The Defendant brings this suppression motion under 18 U.S.C. § 2518(10)(a)(ii) as a facial insufficiency challenge to the "*order* of authorization or approval." However, the Defendant focuses primarily on the *application* for an order authorizing the interception, as the order does not—nor is it required to—refer to the at-issue delegation order.

noncompliance necessitates suppression only if the violated procedure is a central or functional safeguard in the statutory scheme to prevent abuses of the wiretap act and the violation prejudices the defendant. *Id*.

Reference to the correct delegation order in the application for an order is not a central or functional safeguard in the statutory scheme; nor was the defendant unfairly prejudiced by this technical error. *See United States v. Mainor*, 393 F. App'x 10, 15 (3d Cir. 2010) (finding no facial insufficiency where AUSA's application accidentally referenced outdated AG Authorization Order). The fact that the statute does not explicitly require reference to a delegation order "weighs against a determination" that the disclosure is a "central or a functional safeguard in the statutory scheme." *Carson*, 520 F. App'x at 892. Additionally, both the application and the subsequent order authorizing the interception otherwise listed all of the specific information called for by the statute, including the target subjects, the target telephone, the target offenses, the relevant time period, the types of communications sought to be intercepted, the target facilities, the identity of the person and agency authorizing the application, and a description of the communication sought to be intercepted.[2] The only defect is ultimately a mere misidentification of the operative delegation order. And the Eleventh Circuit's position that such error "amounts to a mere technical defect [that] need not result in suppression" governs here. *United States v. Holden*, 603 F. App'x 744, 749 (11th Cir. 2015). But according to the statute, neither the application nor the authorizing order had to reference *any* operative delegation order at all. Plus, the accompanying authorization memorandum referencing the correct delegation order effectively eliminated any lingering semblance of a statutory safeguard violation or any undue prejudice to the defendant. *See United*

[2] An affidavit from FBI Special Agent Donald VanHoose, attached to the interception application, laid out the specific facts required by the statute. Doc. 374-1 at 22.

*States v. Jones*, 600 F.3d 847, 853 (7th Cir. 2010) (denying suppression of wire interception because the defendants could not prove prejudice based on the warrant affidavit's reference to an outdated delegation order). The application, then, had the requisite elements under § 2518(4) and the subsequent February 28, 2017 authorization order was supported by ample probable cause.

Next, Defendant Pouncy also moves to suppress the interceptions because the Government failed to timely seal the communications. Title 18, U.S.C. § 2518(8)(a) requires that the intercepted communications be sealed "[i]mmediately upon the expiration of the . . . order" in order to ensure the reliability and integrity of the evidence obtained, *United States v. Ojeda Rios*, 495 U.S. 257, 263 (1990). The Eleventh Circuit has previously determined that the Government acts in accordance with this immediacy requirement if it seals the communications within one or two days of the order's expiration. *United States v. Matthews*, 431 F.3d 1296, 1307 (11th Cir. 2005). Excluding weekends, approximately four business days passed between the expiration of the order and sealing. Although the Defendant is correct that the communications were not sealed "immediately," the Government has provided a "satisfactory explanation," as contemplated by § 2518(8)(a), to explain and excuse the delay. The four-day interval between expiration and sealing accounted for travel between separate divisional headquarters. Doc. 374 at 10. And the recordings were sealed only one day after arriving in Mobile, Alabama from Miami, Florida, the physical "recording hub" for the Southeast region, *id*. at 9—lessening the concern that the Government had an opportunity to "tamper with, alter, or edit the conversations that have been recorded," *Ojeda Rios*, 495 U.S. at 263. The Government demonstrated good cause for the delay and the interceptions were therefore not in violation of the immediacy requirement.

Finally, the Defendant argues that the affidavit in support of the wiretap application failed to demonstrate the requisite "necessity" under § 2518(1)(c) for the wiretap application because the

Government "did not seek . . . other methods . . . before advancing to the request for the wire taps." Doc. 367 at 4. This argument is plainly contradicted by FBI Special Agent VanHoose's statement that "normal investigative techniques have been used and have not succeeded in achieving the goals of the investigation." Doc. 374-1 at 76–77 ¶ 102. Pursuant to the statute, the Government must "show why alternative measures are inadequate for this particular investigation." *United States v. Gray*, 544 F. App'x 870, 881 (11th Cir. 2013) (quoting *United States v. Perez*, 661 F.3d 568, 581 (11th Cir. 2011) (per curiam)). Though, as the Government points out, the affidavit "need not show a 'comprehensive exhaustion of all possible techniques.'" *Id.* (quoting *United States v. Van Horn*, 789 F.2d 1492, 1496 (11th Cir. 1986)). Here, the other attempted tactics included using confidential sources, analyses of historical calling records, pen register and trap and trace devices, physical surveillance, undercover officers, trash extraction, and subject interviews. Doc. 374-1 at 77 ¶ 104. While these methods were helpful in obtaining evidence to bring charges against the Defendant, Agent VanHoose testified that interception was the "only option" to prosecute other members of the conspiracy and to uncover further elements of the Defendant's scheme. *Id.* The affidavit avers that because the Vulture City street gang controls a tightly knit geographic region, physical surveillance "is nearly impossible," and the target subjects are "extremely wary" of outsiders who make contact with the gang. *Id.* ¶¶ 106, 112. The affidavit analyzes in detail the remaining investigative techniques before concluding that a wire interception was necessary to "determine the scope of the conspiracy and all of its members." *Gray*, 544 F. App'x at 881. This showing clearly fulfilled the necessity requirements under § 2518(1)(c).

Accordingly, the Defendant's motion is **DENIED**.

So ordered.

Done, on this 19th day of February, 2019.

/s/ Richard W. Goldberg
Richard W. Goldberg, Judge